

No. 11725

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. J. GOERIG AND CLYDE PHILP,

Appellants,

vs.

CONTINENTAL CASUALTY COMPANY,
a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Southern Division

NOV 28 1947

PAUL P. O'BRIEN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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Clyde Philp, Defendants and Appellants.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

Insurance Building,
Seattle 4, Washington,

Attorneys for Continental Casualty Co.,
Defendant and Appellee.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 257

THE UNITED STATES OF AMERICA, for the
use and benefit of YAKIMA CEMENT PROD-
UCTS COMPANY, a corporation,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG, CLYDE PHILP, individuals and
co-partners doing business as Macri & Com-
pany, and CONTINENTAL CASUALTY
COMPANY, a corporation,

Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action
against the defendants, complains and alleges:

1.

This action is brought in the name of United States of America as plaintiff for the use and benefit of Yakima Cement Products Company, a corporation, hereafter referred to as the "use-plaintiff," under and by virtue of the authority granted by an act of Congress, approved August 24, 1935 (c. 642, Sections 1 and 2, 49 Statutes at large 793, 794, 40 USCA 270 (a and b)).

2.

That the Yakima Cement Products Company, use-plaintiff herein, is a corporation organized and existing under the laws and statutes of the State of Washington having its principal place of business in Yakima, Washington. That all license fees due and owing to the State of Washington have been paid.

3.

That Sam Macri, Don Macri, Joe Macri, A. J. Goerig and Clyde Philp are individuals and as to all matters herein mentioned were co-partners doing business under the assumed name of Macri & Company. and Macri Company. And that said individuals are residents of King County, State of Washington. That hereinafter, said defendants will be referred to collectively as Macri Company.

4.

That at all times herein mentioned, the defendant, Continental Casualty Company, was, and now is a corporation authorized to transact a general surety business in the State of Washington.

5.

That on or about December 7, 1943, the plaintiff, United States of America, and the defendant, Macri Company, entered into a contract in writing under the terms of which the defendant, Macri Company, agreed to construct earthwork, pipe lines and structures on laterals 59.3 to 69.8 and sublaterals under

schedule No. 1 of Specification No. 1062, Roza Division, Yakima Project, Washington, the same being Government Contract No. 12r-14825 wherein and whereby said Macri Company contracted to furnish materials and perform work in accordance with the terms of said contract and specifications for the sum of \$128,550.95. That said contract is hereafter referred to as Contract No. 1062.

6.

That on or about May 18, 1944, the plaintiff, United States of America, and the defendant, Macri Company, entered into a contract in writing under the terms of which the defendant, Macri Company, agreed to construct earthwork, pipe lines, and structures, laterals 70.1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sublateral East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, under the schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington, the same being Government Contract No. 12r-14996, wherein and whereby said Macri Company contracted to furnish materials and perform work in accordance with the terms of said contract and specifications for the sum of \$169,667.50. That said contract is hereafter referred to as Contract No. 1068.

7.

That on or about the 7th day of December, 1943, to secure the prompt payment to all persons supply-

ing labor or materials employed or used in the prosecution of the work provided for in said Contract No. 1062, the said Macri Company, as principal, and the Continental Casualty Company, a corporation, as surety, made, executed and delivered to the United States of America as obligee, a bond or undertaking as provided by law in the sum of \$64,275.48, which said bond or undertaking was and is by its terms binding upon said surety and upon said principals, their heirs, executors, successors or assigns, and has been at all times since said time and now is in full force and effect.

8.

That on or about the 18th day of May, 1944, to secure the prompt payment to all persons supplying labor or materials employed or used in the prosecution of work provided for in said Contract No. 1068, the said Macri Company, as principal, and the Continental Casualty Company, a corporation, as surety, made, executed and delivered to the United States of America as obligee, a bond or undertaking as provided by law in the sum of \$84,833.75, which said bond or undertaking was and is by its terms binding upon said surety and upon said principals, their heirs, executors, successors or assigns, and has been at all times since said time and now is in full force and effect.

9.

That the aforesaid contract was and now is a contract for the prosecution and completion of a

public work of the United States within the meaning of the act of Congress referred to above and said contract was performed and executed at or near Yakima, Yakima County, in the Eastern District of the State of Washington.

10.

That commencing on or about April 19, 1944, and continuing until on or about February 24, 1945, the use-plaintiff furnished and delivered to the defendant, Macri Company, at the special instance and request of said defendant for use in the prosecution of the work provided for in said Contract No. 1062 between the defendant, Macri Company, and the United States of America, certain materials for use in the ditches and laterals and other structures constructed under and by virtue of said contract. That said materials consisted of concrete pipe and other materials necessary in laying and joining said pipe. That the reasonable value and agreed price for said materials so furnished on said Contract No. 1062 was the sum of \$16,420.31.

11.

That commencing on or about December 4, 1944, and continuing until on or about August 18, 1945, the use-plaintiff furnished and delivered to the defendant, Macri Company, at the special instance and request of said defendant for use in the prosecution of the work provided for in said Contract No. 1068 between the defendant, Macri Company, and the United States of America, certain materials

for use in the ditches and laterals and other structures constructed under and by virtue of said contract. That said materials consisted of pipe and other materials necessary in laying and joining said pipe and in the construction of other structures under said contract, and that the reasonable value and agreed price for said materials so furnished on said contract No. 1068 was the sum of \$19,509.74.

12.

That said Macri Company made certain payments from time to time during the course of the delivery of said materials on Contracts Nos. 1062 and 1068, upon the purchase price thereof, an itemized statement of which said payments are as follows:

June 15, 1944 (cash)	\$ 1,619.64
September 16, 1944 (cash)	5,000.00
November 3, 1944 (cash).....	5,000.00
February 2, 1945 (credit for sales tax).....	6.15
February 19, 1945 (merchandise)	8.61
March 7, 1945 (cash)	2,000.00
April 3, 1945 (merchandise).....	98.00
April 21, 1945 (cash).....	10,000.00
June 30, 1945 (merchandise)	3.90
September 21, 1945 (merchandise)	62.40
September 26, 1945 (merchandise	81.69
October 23, 1945 (merchandise).....	108.15
Total.....	<hr/> \$23,988.54

That the sums so paid by the defendant, Macri Company, were, by the use-plaintiff, applied first to the balance due upon the purchase price of the materials furnished for use under said Contract No. 1062, and that said payments were sufficient to cover the entire purchase price of those materials.

That the balance of said sums so paid, to-wit, the sum of \$7,568.23, has been applied by the use-plaintiff to the indebtedness incurred by the defendant upon the purchase price of the materials aforesaid for use under Contract No. 1068, leaving a balance due and owing upon said account in the sum of \$11,941.51. That though duly demanded no part of said \$11,941.51 has been paid.

13.

That as part of the agreement for the sale and delivery of said materials for use under said Contracts Nos. 1062 and 1068 by the use-plaintiff to the defendant, Macri Company, said defendant agreed to purchase such materials used upon terms as follows: "Net 30 days, interest at 6 per cent on past due accounts." That by virtue of said agreement and the failure of the said defendant to pay for said material upon such terms, interest has accumulated upon the purchase price of said pipe to the 23rd day of October, 1945, that being the date of the last entry in the account of said defendant for the materials mentioned above, in the sum of \$652.34; and that said interest is due and owing to the use-plaintiff in addition to the balance due on purchase price as hereinbefore mentioned.

14.

That all of the materials sold and delivered by the use-plaintiff to the defendant, Macri Company, were delivered to the said defendant at the site of construction mentioned in said contracts, or to said

defendant's trucks, and were all incorporated in and became a part of the materials supplied under said contracts by the defendant, Maeri Company, to the United States of America. That said contracts were by their terms to be performed and executed in or near Yakima, Yakima County, in the Eastern District of Washington, and the same were in fact so performed and executed.

15.

That more than ninety days have elapsed since the last of said materials were furnished by the use-plaintiff and that less than one year has elapsed since the complete performance and final settlement of said contract No. 1062 was made. The final settlement and acceptance under said contract was made on March 31, 1945. That less than one year has elapsed since the complete performance and final settlement of Contract No. 1068 was made. The final settlement and acceptance under said contract was made on October 15, 1945.

Wherefore, the plaintiff, United States of America, prays for judgment for the use and benefit of the Yakima Cement Products Co., a corporation, against the defendants and each of them, individually and severally in the sum of \$12,593.85 together with interest thereon at 6 per cent per annum from October 23, 1945, until paid and together with plaintiff's costs and disbursements herein incurred and hereinafter to be taxed.

D. V. & LANE MORTHLAND,
Attorneys for Plaintiff.

State of Washington,
County of Yakima—ss.

J. R. Sherman, being first duly sworn on oath deposes and says: That I am the Secretary-Treasurer of the Yakima Cement Products Company, a corporation, the use-Plaintiff named in and which makes the within and foregoing Complaint, and that I am authorized to verify same for and on behalf of said corporation; that I have read the foregoing Complaint, know the contents thereof, and that the same is true as I verily believe.

J. R. SHERMAN.

Subscribed and sworn to before me this 7th day of March, 1946.

[Seal] LANE MORTHLAND

Notary Public in and for the State of Washington,
residing at Yakima.

Filed March 9, 1946.

[Title of District Court and Cause.]

ANSWER

Come now the defendants Clyde Philp and A. J. Goerig and for answer to plaintiff's complaint admit, deny and allege as follows:

1.

For answer to paragraph 1 of plaintiff's complaint these answering defendants not being in-

formed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 1.

2.

For answer to paragraph 2 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 2.

3.

For answer to paragraph 3 of plaintiff's complaint these answering defendants deny each and every allegation therein contained and particularly deny that A. J. Goerig and Clyde Philp, together with Sam Macri, Don Macri, and Joe Macri, were co-partners as to any of the matters therein mentioned and deny that they did business under the assumed name of Macri & Company and Macri Company. These answering defendants further allege that any relationship that may have existed between these answering defendants and the remaining above named defendants were terminated prior to the incurring of liability, if any, referred to and alleged in said complaint.

4.

For answer to paragraph 4 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 4.

5.

For answer to paragraph 5 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

6.

For answer to paragraph 6 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

7.

For answer to paragraph 7 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

8.

For answer to paragraph 8 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

9.

For answer to paragraph 9 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

10.

For answer to paragraph 10 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

11.

For answer to paragraph 11 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

12.

For answer to paragraph 12 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

13.

For answer to paragraph 13 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

14.

For answer to paragraph 14 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

15.

For answer to paragraph 15 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully answered plaintiff's complaint pray that the same be dismissed with prejudice and that these answering defendants be granted judgment against the plaintiff and against Yakima Cement Products Company, a corporation, for their costs and disbursements taxable by law.

NAT. U. BROWN,

KENNETH C. HAWKINS.

Attorneys for defendants

A. J. Goerig and

Clyde Philp.

Service accepted and copy received of the foregoing Answer this 27th day of March, 1946.

D. V. MORTHLAND,
LANE MORTHLAND,
Attorneys for Plaintiff.

Filed May 17, 1946.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Continental Casualty Company, a corporation, and in answer to plaintiff's complaint admits, denies and alleges as follows, to-wit:

First Defense

I.

This answering defendant admits Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 15 of plaintiff's complaint.

II.

This answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraphs 10, 11, 13 and 14 and therefore denies said paragraphs and each and every part thereof, and specifically denies that this answering defendant is indebted to the plaintiff in the sum of \$11,941.51 or any other sum whatsoever or at all.

III.

In answer to Paragraph 12 of plaintiff's complaint, this answering defendant admits that pay-

ments were made but alleges that it is without knowledge or information sufficient to form a belief as to the truth or veracity as to the remainder of said paragraph or as to how or in what manner plaintiff applied the payments received and therefore denies said portions of Paragraph 12.

Cross-Complaint

Comes now this answering defendant and for cross-complaint against Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company and alleges as follows, to-wit:

I.

This cross-complaining defendant, Continental Casualty Company, realleges and makes a part hereof as though fully set forth at length Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 15 of plaintiff's complaint.

II.

That in connection with the issuance of defendant Continental Casualty Company's payment bond above mentioned and as part of the consideration for the issuance thereof, the defendant Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things, said application for bond contains the following words and phrases, to-wit:

“Second. To indemnify the company against all loss, costs, damages, expenses and attorney’s fees whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained.”

III.

That in the event use plaintiff in this case recovers judgment against Continental Casualty Company, then under the terms of said bond application and said bond, the said defendant, Continental Casualty Company, is entitled to and hereby demands judgment in an equal amount, plus costs and attorney’s fees against each of the above named copartners and joint adventurers and each of them jointly and severally.

Wherefore, having fully answered use plaintiff’s complaint, this defendant, Continental Casualty Company, prays that said complaint be dismissed and held for naught and further demands that in the event that judgment is rendered in favor of use plaintiff against Continental Casualty Company, that it have and recover judgment in an equal amount, plus its costs and disbursements of this suit and a reasonable attorney’s fee to be fixed by said Court, against each of the above named indi-

vidual defendants doing business as Macri & Company, co-partners and joint adventurers, and each of them jointly and severally.

SKEEL, McKELVY,
EVENSON & UHLMANN,
By WILLARD E. SKEEL.

United States of America,
State of Washington,
County of King—ss.

Warner M. Bruce, being first duly sworn, on oath deposes and says: That he is superintendent of Continental Casualty Company, a corporation, the defendant in the above entitled action; that he makes this verification for and on behalf of said corporation; that he is authorized so to do; that he has read the foregoing instrument, knows the contents thereof and believes the same to be true.

WARNER M. BRUCE.

Subscribed and sworn to before me this 18th day of March, 1946.

[Seal] K. VAN IORNS,
Notary Public in and for the State of Washington,
residing at Seattle.

Copy received 3/19/46.

BRETHORST, HOLMAN,
FOWLER & DEWAR,
Attys. for Defts. Macri.

Filed March 26, 1946.

[Title of District Court and Cause.]

REPLY OF A. J. GOERIG AND CLYDE PHILP
TO ANSWER AND CROSS-COMPLAINT
OF CONTINENTAL CASUALTY COM-
PANY

Come now A. J. Goerig and Clyde Philp, two of the above named defendants, and for reply to the answer and cross-complaint of Continental Casualty Company admit, deny and allege as follows, to-wit:

1.

For reply to paragraphs I, II and III of said defendant Continental Casualty Company's first defense these defendants A. J. Goerig and Clyde Philp deny each and every allegation therein contained.

2.

For reply to paragraphs I, II and III of said defendant Continental Casualty Company's cross-complaint these defendants A. J. Goerig and Clyde Philp deny each and every allegation therein contained.

Wherefore, having fully replied to the answer and cross-complaint of Continental Casualty Company, these defendants A. J. Goerig and Clyde Philp pray that said answer and cross-complaint be dismissed and that they go hence with their costs.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for A. J. Goerig
and Clyde Philp.

Filed June 6, 1946.

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL

Pursuant to an oral order for pre-trial under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 7th day of January, 1947.

Lane Morthland appearing as attorney for the plaintiff;

Thomas Holman and A. T. Bateman appearing as attorneys for the defendants Macri;

Nat U. Brown appearing as attorney for defendants Goerig and Philp;

Willard E. Skeel appearing as attorney for Continental Casualty Company.

It is stipulated that the following exhibits may be marked for identification and received in evidence at the trial without objection as to authenticity of the documents and signatures.

Plaintiff's Identification "A"—Certified copy of contract and bond as to Specification #1062.

Plaintiff's Identification "B"—Certified copy of contract and bond as to Specification #1068.

Defendant Casualty Company's Identification "1"—Application for contract bond on Specification #1062.

Defendant Casualty Company's Identification "2"—Application for contract bond on Specification #1068.

Defendant Macri Identification "1"—Joint venture agreement with Goerig and Philp on Specification #1062.

Defendants Macri Identification "2"—Joint venture agreement with Goerig and Philp on Specification #1068.

Defendants Goerig and Philp Identification "1"—Agreement terminating joint ventures.

It is further stipulated that the use plaintiff is entitled to judgment in the amount of \$11,941.51 subject to the surety showing distribution as to specifications #1062 and #1068, subject to judgment being appropriate fixed as to judgment debtors and to the determination of whether or not the use plaintiff's claim for interest (based upon a contract to pay interest or otherwise) is valid.

It is further stipulated that there are no written agreements between the defendants Macri and defendants Goerig and Philp other than defendants Macri Identification "1" and "2" and defendants Goerig and Philp Identification "1" pertaining to Specifications #1062 and #1068.

It is further stipulated that the use plaintiff is a corporation and that its last annual license fees have been paid and it has a full right to sue.

It is further stipulated that the Continental Casualty Company is a corporation licensed to do business in the State of Washington and has paid its last and all other license fees.

It is further stipulated that at the time of entering the principal contracts, the defendants Sam Macri, Joe Macri and Don Macri were and are still co-partners doing business under the firm name and style of Macri & Company and are all residents of

the City of Seattle in the Western District of Washington.

It is further stipulated that this cause be consolidated with causes numbered 250, 251, 255 and 267 for the trial of the remaining issues and be tried on February 19, 1947, at 10:00 a.m.

It Is Ordered and Adjudged that the above stipulations be and the same are hereby approved and made a part of the record in the above entitled cause.

Dated this 27th day of January, 1947.

SAM M. DRIVER,

United States District Judge.

Filed Jan. 27, 1947.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action coming on regularly for trial before the Court without a jury, plaintiff appearing personally and by its attorneys of record, D. V. and Lane Morthland, and the defendants, and each of them, appearing personally and by their respective attorneys of record herein, and evidence having been adduced and proof taken, and the Court having taken the matter under advisement and having on March 27, 1947, rendered a memorandum opinion herein and being fully advised in the premises, and in accordance with said memorandum opinion, the Court makes the following

Findings of Fact

1.

This action is brought in the name of United States of America as plaintiff for the use and benefit of Yakima Cement Products Company, a corporation, hereafter referred to as the "use-plaintiff," under and by virtue of the authority granted by an act of Congress, approved August 24, 1935 (c. 642, Sections 1 and 2, 49 Statutes at Large 793, 794, 40 USCA 270 (a) and (b)).

2.

That the Yakima Cement Products Company, use-plaintiff herein, is a corporation organized and existing under the laws and statutes of the State of Washington having its principal place of business in Yakima, Washington. That all license fees due and owing to the State of Washington have been paid.

3.

That at all times herein mentioned, the defendants Sam Macri, Joe Macri, Don Macri were co-partners doing business as Macri & Company. That the defendants Clyde Philp and A. J. Goerig had been previously associated with said named Macris under a joint-venture agreement. That all of the last named defendants were and now are citizens of the State of Washington.

4.

That at all times herein mentioned, the defendant Continental Casualty Company was and now is a

corporation authorized to transact a general surety business in the State of Washington.

5.

That on or about December 7, 1943, the plaintiff, United States of America, and the defendant, Macri Company, entered into a contract in writing under the terms of which the defendant, Macri Company, agreed to construct earthwork, pipe lines and structures on laterals 59.3 to 69.8 and sublaterals under Schedule No. 1 of Specification No. 1062, Roza Division, Yakima Project, Washington, the same being Government Contract No. 12r-14825 wherein and whereby said Macri Company contracted to furnish materials and perform work in accordance with the terms of said contract and specifications for the sum of \$128,550.95. That said contract is hereafter referred to as Contract No. 1062.

6.

That on or about May 18, 1944, the plaintiff, United States of America, and the defendant, Macri Company, entered into a contract in writing under the terms of which the defendant, Macri Company, agreed to construct earthwork, pipe lines, and structures, laterals 70.1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sublaterals East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, under the schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington, the same being Gov-

ernment Contract No. 12r-14996, wherein and whereby said Macri Company contracted to furnish materials and perform work in accordance with the terms of said contract and specifications for the sum of \$169,667.50. That said contract is hereafter referred to as Contract No. 1068.

7.

That on or about the 7th day of December, 1943, to secure the prompt payment to all persons supplying labor or materials employed or used in the prosecution of the work provided for in said Contract No. 1062, the said Macri Company, as principal, and the Continental Casualty Company, a corporation, as surety, made, executed and delivered to the United States of America as obligee, a bond or undertaking as provided by law in the sum of \$64,275.48, which said bond or undertaking was and is by its terms binding upon said surety and upon said principals, their heirs, executors, successors or assigns, and has been at all times since said time and now is in full force and effect.

8.

That on or about the 18th day of May, 1944, to secure the prompt payment to all persons supplying labor or materials employed or used in the prosecution of the work provided for in said Contract No. 1068, the said Macri Company, as principal, and the Continental Casualty Company, a corporation, as surety, made, executed and delivered to the

United States of America as obligee, a bond or undertaking as provided by law in the sum of \$84,833.75, which said bond or undertaking was and is by its terms binding upon said surety and upon said principals, their heirs, executors, successors or assigns and has been at all times since said time and now is in full force and effect.

9.

That the aforesaid contract was and now is a contract for the prosecution and completion of a public work of the United States within the meaning of the act of Congress referred to above and said contract was performed and executed at or near Yakima, Yakima County, in the Eastern District of the State of Washington.

10.

That commencing on or about April 19, 1944, and continuing until on or about February 24, 1945, the use-plaintiff furnished and delivered to the defendant, Macri Company, at the special instance and request of said defendant for use in the prosecution of the work provided for in said Contract No. 1062 between the defendant, Macri Company, and the United States of America, certain materials for use in the ditches and laterals and other structures constructed under and by virtue of said contract. That said materials consisted of concrete pipe and other materials necessary in laying and joining said pipe. That the reasonable value and agreed price for said

materials so furnished on said Contract No. 1062 was the sum of \$16,420.31.

11.

That commencing on or about December 4, 1944, and continuing until on or about August 18, 1945, the use-plaintiff furnished and delivered to the defendant, Macri Company, at the special instance and request of said defendant for use in the prosecution of the work provided for in said Contract No. 1063 between the defendant, Macri Company, and the United States of America, certain materials for use in the ditches and laterals and other structures constructed under and by virtue of said contract. That said materials consisted of pipe and other materials necessary in laying and joining said pipe and in the construction of other structures under said contract, and that the reasonable value and agreed price for said materials so furnished on said contract No. 1068 was the sum of \$19,509.74.

12.

That said Macri Company made certain payments from time to time during the course of the delivery of said materials on Contracts Nos. 1062 and 1068, upon the purchase price thereof, an itemized statement of which said payments are as follows:

June 15, 1944 (cash)	\$ 1,619.64
September 16, 1944 (cash)	5,000.00
November 3, 1944 (cash).....	5,000.00
February 2, 1945 (credit for sales tax).....	6.15
February 19, 1945 (merchandise)	8.61
March 7, 1945 (cash)	2,000.00
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April 21, 1945 (cash).....	10,000.00
June 30, 1945 (merchandise)	3.90
September 21, 1945 (merchandise)	62.40
September 26, 1945 (merchandise	81.69
October 23, 1945 (merchandise).....	108.15
Total.....	<hr/> \$23,988.54

That the sums so paid by the defendant, Macri Company, were by the use-plaintiff, applied first to the balance due upon the purchase price of the materials furnished for use under said Contract 1062, and that said payments were sufficient to cover the entire purchase price of those materials. That the balance of said sums so paid, to-wit: the sum of \$7,568.23, has been applied by the use-plaintiff to the indebtedness incurred by the defendant upon the purchase price of the materials aforesaid for use under Contract No. 1068, leaving a balance due and owing upon said account in the sum of \$11,941.51. That though duly demanded no part of said \$11,941.51 has been paid.

13.

That all of the materials sold and delivered by the use-plaintiff to the defendant, Macri Company, were delivered to the said defendant at the site of construction mentioned in said contracts, or to said defendant's trucks, and were all incorporated in

and became a part of the materials supplied under said contracts by the defendant, Macri Company, to the United States of America. That said contracts were by their terms to be performed and executed in or near Yakima, Yakima County, in the Eastern District of Washington, and the same were in fact so performed and executed.

14.

That more than ninety days have elapsed since the last of said materials were furnished by the use-plaintiff and that less than one year has elapsed since the complete performance and final settlement of said Contract No. 1062 was made and this suit commenced. The final settlement and acceptance under said contract was made on March 31, 1945. That less than one year has elapsed since the complete performance and final settlement of Contract No. 1068 was made and this suit commenced. The final settlement and acceptance under said contract was made on October 15, 1945.

15.

That in connection with the issuance of defendant Continental Casualty Company's payment bond, above referred to, and as part of the consideration for the issuance thereof, defendant Macri & Company for and on behalf of each of the defendants above-named as co-partners and joint adventurers, to-wit: Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment

bond. That among other things said application for bond contains the following words and phrases to-wit:

“Second: To indemnify the company against all loss, costs, damages, expenses and attorney’s fees whatever, and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained.”

The Court having heretofore made and entered its Findings of Fact does now make the following

Conclusions of Law

1.

That the plaintiff is entitled to judgment against the defendants, Sam Macri, Don Macri and Joe Macri, co-partners, doing business as Macri and Company, and the defendant, Continental Casualty Company, an Indiana corporation, and each of them jointly and severally, in the sum of \$11,941.51 with interest thereon at the rate of six per cent (6%) per annum from October 23, 1945, until paid and together with plaintiff’s costs and disbursements herein incurred and hereafter to be taxed.

2.

Continental Casualty Company, an Indiana corporation, is entitled to judgment upon its cross-

complaint against the defendants, Sam Macri, Don Macri, Joe Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers, doing business as Macri & Company in the amount of \$11,941.51 with interest thereon at the rate of 6 per cent per annum from October 23, 1945, together with reasonable attorneys' fees in the amount of \$325.00 together with their costs and disbursements herein incurred.

3.

The defendants A. J. Goerig and Clyde Philp are entitled to a judgment of dismissal against the defendants Sam Macri, Joe Macri and Don Macri on the latters' cross-complaint against A. J. Goerig and Clyde Philp without costs.

4.

The defendants, Sam Macri, Joe Macri and Don Macri, are entitled to a judgment of dismissal against the defendants A. J. Goerig and Clyde Philp on the latters' cross-complaint against the Macris without costs.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN.

By WILLARD E. SKEEL.

Filed May 1, 1947.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 257

THE UNITED STATES OF AMERICA, for the
use and benefit of YAKIMA CEMENT PROD-
UCTS COMPANY, a corporation,

Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.
GOERIG, CLYDE PHILP, individuals and
co-partners doing business as Macri & Com-
pany, and CONTINENTAL CASUALTY
COMPANY, a corporation,

Defendants.

JUDGMENT

The above entitled action coming on regularly be-
fore the Court for trial, plaintiff appearing person-
ally and by its attorneys of record, D. V. and Lane
Morthland, and defendants and each of them, ap-
pearing in person and by their respective counsel
of record herein, and evidence having been adduced
and proof taken and the Court having made and
entered its findings of fact and conclusions of law,
and being fully advised in the premises and in ac-
cordance with said findings of fact and conclusions
of law,

It Is Hereby Ordered, Adjudged and Decreed; That the plaintiff be and it hereby is awarded judgment against the defendants Sam Macri, Don Macri and Joe Macri, co-partners, doing business as Macri and Company, and the defendant Continental Casualty Company, an Indiana corporation, jointly and severally in the amount of \$11,941.51, together with interest thereon at the rate of six per cent (6%) per annum from October 23, 1945, until paid and together with plaintiff's costs and disbursements herein incurred taxed at \$33.59.

It Is Further Ordered, Adjudged and Decreed that Continental Casualty Company, an Indiana corporation is hereby awarded judgment against the defendants, Sam Macri, Don Macri, Joe Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers, doing business as Macri & Company in the amount of \$11,941.51 with interest thereon at the rate of six per cent per annum from October 23, 1945, together with a reasonable attorneys' fee in the amount of \$325, together with their costs and disbursements herein incurred taxed at \$. none.

It Is Further Ordered, Adjudged and Decreed that A. J. Goerig and Clyde Philp are granted a judgment of dismissal as against the defendants, Sam Macri, Joe Macri and Don Macri, on the latter's cross-complaint without costs.

It Is Further Ordered, Adjudged and Decreed that the defendants Sam Macri, Joe Macri and Don Macri are granted a judgment of dismissal against

the defendants A. J. Goerig and Clyde Philp on the latter's cross-complaint without costs.

It Is Further Ordered, Adjudged and Decreed that the defendants, A. J. Goerig and Clyde Philp be and the same are hereby awarded judgment of dismissal against the beneficial plaintiff, Yakima Cement Products Company, a corporation, on its complaint against them without costs.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN.

By WILLARD E. SKEEL,

Attorneys for Continental
Casualty Company.

Filed May 1, 1947.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the defendants, A. J. Goerig and Clyde Philp and respectfully move the court for the entry of an order setting aside the judgment heretofore entered herein and entering judgment in the favor of these defendants or in the alternative granting these defendants a new trial upon the grounds and for the following reasons:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which the losing party was prevented from having a fair trial;

2. Misconduct of the prevailing party, his attorney or the jury;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

5. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or decision;

7. Error in law occurring at the trial;

8. Where the right to procure a transcript of the testimony or proceedings has been lost without any fault or negligence on the part of the losing party.

The particular error relied upon by these defendants in moving for said new trial is the ruling and judgment of the court that the defendant, Continental Casualty Company is entitled to judgment over and against these defendants notwithstanding the plaintiff obtained no judgment against these defendants; that under the bond and application these defendants are obligated to indemnify the

Continental Casualty Company only against liability for which these defendants are responsible.

The particular error relied upon by these defendants in moving for said new trial is the ruling of the court that the termination agreement did not absolve these defendants from all liabilities.

This motion is based upon the pleadings and papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

NAT. U. BROWN,
KENNETH C. HAWKINS,
Attorneys for Defendants
A. J. Goerig and
Clyde Philp.

Copy received this 12th day of May, 1947.

D. V. & LANE MORTHLAND.

Filed May 12, 1947.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter having come on for argument on the 20th day of May, 1947, before the Hon. Sam M. Driver, United States District Judge, upon the motion of defendants, A. J. Goerig and Clyde Philp, for a new trial; and the Court having listened to argument and believing that the Court's original decision in this matter was correct that none of the grounds for defendants' motion for new trial exist

or are well taken; and the Court being otherwise fully advised in the premises, it is

Now, Therefore,

Ordered, Adjudged and Decreed that the motion for new trial of defendants, A. J. Goerig and Clyde Philp, be and the same is hereby denied, to all of which said defendants, A. J. Goerig and Clyde Philp, except and their exception is allowed.

Done in Open Court this 20th day of May, 1947.

SAM M. DRIVER,

Judge.

Presented by:

WILLARD E. SKEEL.

Filed May 20, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that A. J. Goerig and Clyde Philp, two of the defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on the 1st day of May, 1947, and from order denying A. J. Goerig and Clyde Philp's motion for new trial entered on the 20th day of May, 1947.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Appellants

A. J. Goerig and

Clyde Philp.

Copies mailed to: D. V. and Lane Morthland, Miller Bldg., Yakima, Washington; Skeel, McKelvy, Henke, Evenson & Uhlmann. Ins. Bldg., Seattle, Wash.; Brethorst, Holman, Fowler & Dewar, 17th Floor, Hoge Bldg., Seattle, Wash., this 29th day of July, 1947.

A. A. LaFRAMBOISE,

Clerk.

By MARIE EALY,

Deputy.

Filed July 29, 1947.

[Title of District Court and Cause.]

APPELLANTS' A. J. GOERIG AND CLYDE
PHILP'S STATEMENT OF POINTS ON
APPEAL

I. The United States District Court was in error in entering judgment against Clyde Philp and A. J. Goerig in favor of the Continental Casualty Company for the following reasons:

1. The materials or labor furnished by the use plaintiff, a reasonable value of which use plaintiff is suing for and was awarded judgment for were furnished with respect to specification 1068, and the obligation which the bonding company was obligated to pay herein was used with respect to specification 1068. Goerig and Philp did not enter into any joint venture agreement with respect to 1068 and were not co-partners or co-adventurers of Macri & Company with respect to specification 1068, and were not therefore liable to indemnify or compen-

sate the Continental Casualty Company for any moneys which it was required to pay on its bond with respect to specification 1068.

2. Goerig and Philp did not sign and were not parties to the application for the bond or to the bond itself.

3. The Continental Casualty Company did not rely on credit of Goerig and Philp and did not know they were connected with the Macri Company.

4. Goerig and Philp received no proceeds or benefits from the bond, nor did Macri & Company while Goerig and Philp were its silent "partners."

5. The "silent" partnership was terminated prior to affixing of liability on the bond.

6. Parties to a contract can modify or alter same—or rescind it—even though there be a creditor beneficiary, unless and until the creditor beneficiary has changed his position in reliance thereon.

7. A principal is not liable to a surety for an indebtedness that is not the obligation of the principal, even though, for some other reason the surety is liable to the creditor.

II. The United States District Court was in error in denying Goerig and Philp's motion for a new trial for the reasons specified in paragraph I hereof.

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Appellants

A. J. Goerig and

Clyde Philp.

Filed July 30, 1947.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, A. J. Goerig and Clyde Philp, the Defendants above named, as Principal and the Manufacturers Casualty Insurance Company, a corporation organized under the laws of the State of Pennsylvania, and legally doing business in the State of Washington, as Surety, are held and firmly bound unto Sam Macri, Don Macri, Joe Macri, d/b/a Macri and Company and Continental Casualty Company and Yakima Cement Products Company, a corporation, in the just and full sum of Two Hundred Fifty Dollars (\$250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of July, 1947.

The Condition of This Obligation Is Such. That Whereas, the above named Plaintiff, Yakima Cement Products Company, a Corporation, on the 1st day of May, 1947, in the above entitled action and Court, recovered judgment against the Defendants, Sam Macri, et al., and Continental Casualty Company, above named, for \$11,941.51, and costs. Interest from October 23, 1945, and the Continental Casualty Company recovered judgment over against A. J. Goerig and Clyde Philp in said sums plus an attorney's fee in the sum of \$325.00.

And Whereas, the above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principals, A. J. Goerig and Clyde Philp, shall pay Yakima Cement Products Company, Sam Macri, Don Macri, and Joe Macri, and the Continental Casualty Company all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

A. J. GOERIG,
CLYDE PHILP.

[Seal]

MANUFACTURERS
CASUALTY INSURANCE
COMPANY.

By A. A. NAEF,
Attorney-in-Fact.

[Endorsed]: Filed July 29, 1947.

[Title of District Court and Cause.]

United States of America,
Eastern District of Washington—ss.

CLERK'S CERTIFICATE

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the foregoing typewritten

pages numbered 1 to 58, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings, in the above entitled cause, as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants, A. J. Goerig and Clyde Philp, as the same now remains on file and of record in my office and that the same constitutes the record on appeal of said Appellants from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that included in this record on appeal is a copy of all exhibits designated by counsel for Appellants.

I further certify that "the memorandum decision of the Honorable Sam M. Driver dated March 27, 1947" as called for in the Supplemental Designation of the Appellee Continental Casualty Company, is not included in this record on appeal for the reason that no such document was signed or filed in this case.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record as called for in the Designation of record on Appeal of the Appellants amount to \$9.80 and the same has been paid in full by Brown & Hawkins, attorneys for said Appellants.

In Witness Whereof, I have hereunto set my hand

and the seal of said District Court at Yakima, Washington, in said district this 28th day of August, 1947.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court.

By /s/ THOMAS GRANGER,

Deputy.

[Testimony of A. J. Goerig and Clyde Philp is set forth on pages 20 to 39. Stipulated portions of exhibits as called for in designation are set out on pages 58 to 114 of companion cause No. 11722.]

[Endorsed]: No. 11725. United States Circuit Court of Appeals for the Ninth Circuit. A. J. Goerig and Clyde Philp, Appellants, vs. Continental Casualty Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed September 2, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Adoption of Points on Appeal is set out on page 115 of companion cause No. 11722.]

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between Counsel for the respective parties on appeal herein that the above entitled cause may be consolidated for the purpose of printing the record herein and for the purpose of printing the briefs herein and for the purpose of argument.

It is further agreed and stipulated that the Clerk in preparing the printed transcript of the record shall print one (1) only of the following matters previously designated in each of the above captioned cases in the designation and contents of record on appeal:

Testimony of A. J. Goerig.

Testimony of Clyde Philp.

Plaintiff's Exhibit "A"—contract and bond with respect to specification 1062.

Plaintiff's Exhibit "B"—contract and bond with respect to specification 1068.

Plaintiff Continental Casualty Company's Exhibit "1"—application for bond with respect to specification 1062.

Plaintiff Continental Casualty Company's Exhibit "2"—application for bond with respect to specification 1068.

Defendant Macri's Exhibit "1"—Joint venture agreement with respect to specification 1062.

Defendants Macri's Exhibit "2"—joint venture agreement with respect to specification 1068.

Defendants Goerig and Philp's Exhibit "1"—termination agreement.

It is further stipulated that the Clerk in directing the printing of the transcript shall print all of the matters specified in each of the designations in all of the above captioned cases, but shall cause the same to be printed only once and shall eliminate any duplicate printing.

Dated this 17th day of September, 1947.

/s/ NAT U. BROWN,

/s/ KENNETH C. HAWKINS,

Attorneys for Appellants
Goerig and Philp.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

By /s/ WILLARD E. SKEEL,

Attorneys for Appellee
Continental Casualty Company.

[Endorsed]: Filed Sept. 22, 1947.